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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

BRIAN McINERNEY, Plaintiff and Appellant, v. BYRON SCOTT, Defendant and Respondent.	G055738 (Super. Ct. No. 30-2015-00791662) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Nathan R. Scott, Judge. Affirmed.

Silverstein & Huston, Steven A. Silverstein, Mark W. Huston and Robert I. Cohen for Plaintiff and Appellant.

Law Offices of Richard A. Jones, Richard A. Jones and Jarrrick S. Goldhammer; Law Offices of Kristen Martin and Kristen Martin for Defendant and Respondent.

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In the period 2002 to 2011, sports agent and manager Brian McInerney entered into a series of very lucrative contracts with his client, former Lakers star and later coach of several NBA teams, Byron Scott. Though NBA agents normally take no more than 4 percent of their client's income, and never have direct access to their clients' funds, McInerney's contracts gave him 20 percent of Scott's income, plus direct access to at least one of Scott's accounts, plus the right to take his compensation *and* expenses directly from that account.

McInerney's and Scott's last contract was entered into in 2010. But McInerney suffered a stroke in 2011, and could no longer provide any services to Scott. Scott nonetheless continued to pay him – though only 10 percent of his income, not the 20 percent specified in the 2010 contract. Scott hoped McInerney would recover and resume his duties.

But that didn't happen. McInerney never recovered. The post-stroke money paid him by Scott continued through 2015, totaling $530,000.

In 2015, McInerney's wife made claims against Scott based on two discrete parts of the 2010 contract: (1) a deferred compensation addendum to the 2010 contract in which Scott promised to pay McInerney $592,700, and (2) a clause in which Scott promised to pay McInerney severance of $250,000 a year for seven years if McInerney ever became incapacitated. Scott turned these two claims down, and McInerney's wife, as his guardian ad litem, filed this action based on those two claims.

Scott responded with a cross-complaint, alleging McInerney had breached his fiduciary duty to Scott in various ways. These included inveigling Scott into signing ludicrously lopsided contracts in McInerney's favor, failing to properly perform management services, and misappropriating various amounts of money from Scott's accounts.

The case was tried over a three-week period in late August and early September 2017. There was plenty of evidence to support both sides' claims. In the end

the jury returned reciprocal general verdicts: Scott had indeed breached his contract with McInerney; McInerney had indeed breached his fiduciary duty to Scott. The jury awarded $1 to each party.

The trial judge unilaterally reduced the $1 verdicts to zero. After having his new trial motion denied, McInerney brought this appeal. Scott, however, did not cross-appeal.

The theory of McInerney's appeal is that the jury had no substantial evidence on which to return a $1 verdict given its finding that Scott had breached the contract. McInerney had presented only two contract claims, one for $592,700 in deferred compensation and the other for over $1.2 million in severance pay,[1] and thus there was no way that the jury could find McInerney had sustained no "appreciable harm" from a breach of contract. (See Civ. Code, § 3360 [definition of nominal damages where there is a breach of duty but no "appreciable detriment"].)

The linchpin of McInerney's argument is that Scott did not request and the trial court did not give a special jury instruction allowing the jury to offset what Scott owed McInerney for breach of contract with what McInerney owed Scott for his breach of fiduciary duty. McInerney reasons that if the jury was following instructions (as it must be presumed to have done) they could not have come up with a $1 (or zero) award.

We disagree. "[I]t is a fundamental principle of appellate procedure that a trial court judgment is ordinarily presumed to be correct and the burden is on an appellant to demonstrate, on the basis of the record presented to the appellate court, that the trial court committed an error that justifies reversal of the judgment." (*Jameson v. Desta* (2018) 5 Cal.5th 594, 608-609.) It does not follow that because the jury was not given a *special* offset instruction it could not have offset amounts McInerney owed Scott from what Scott owed McInerney. Offset is provided for under section 431.70 of the Code of

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1 At trial McInerney claimed only five years of severance, the total of which amounted to $1,250,000.

Civil Procedure as long as it is asserted in the defense to a claim, and McInerney concedes Scott's answer to his complaint contained an affirmative defense of offset.[2]

McInerney points to no authority to the effect that the jury *couldn't* offset what one party owed the other. The best he can do is to cite to cases which simply hold a jury is presumed to follow the instructions given. (E.g., *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 803-804.) But there were no instructions in this case that *prevented* the jury from doing the logical thing and offsetting what each party owed the other.

More specifically, McInerney makes no attempt to demonstrate error justifying reversal based on the actual figures and amounts before the jury. Even under McInerney's theory the jury did not have to believe that Scott owed both the deferred compensation and severance pay claim – they might have believed the one and disregarded the other. The jury was, after all, instructed that it could disregard contract recoveries if barred by the statute of limitations (CACI No. 338), or if McInerney had not sufficiently performed his side of the contract (CACI Nos. 312 and 321).

Thus the jury might have found Scott owed as little as $592,700 on McInerney's contract claim. However, McInerney's counsel conceded in closing argument that Scott's post-stroke payments amounted to $530,000. Thus the jury might have found Scott's breach of contract caused contract damages as low as $62,700.

And the jury had more than ample evidence against which to offset that $62,700. It had Scott's testimony that McInerney diverted a 2009 IRS tax refund check of about $300,000 to his own account. It had evidence McInernery paid his then girlfriend (subsequently his wife) some $216,000 under the guise of her being a

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[2] The statute provides in pertinent part: "Where cross-demands for money have existed between persons at any point in time when neither demand was barred by the statute of limitations, and an action is thereafter commenced by one such person, the other person may assert in the answer the defense of payment in that the two demands are compensated so far as they equal each other, . . . "

consultant on a Florida land investment which Scott had made. There was also testimony McInerney paid $75,000 to the same girlfriend in 2006 to help pay her office rent under the guise of paying a firm known as "Alpha Lending," And on top of that, the jury heard Scott's testimony that McInerney had diverted some $150,000 of Scott's money into an account McInerney had with Chase Bank.

The sum total of just these amounts is $741,000, which readily exceeds the deferred compensation claim of $592,700. And that's without taking into account the $530,000 that Scott paid McInerney in the post-stroke period. The jury thus had more than enough evidence to offset any appreciable harm that McInerney might have sustained from Scott's breach of contract.

We conclude McInerney has failed to demonstrate a lack of sufficient evidence to support the jury's $1 award in his favor. The judgment is therefore affirmed. Scott will recover his costs on appeal.

BEDSWORTH, ACTING P. J.

WE CONCUR:

MOORE, J.

IKOLA, J.